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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-410

SOO LINE RAILROAD COMPANY, *Petitioner*,

vs.

R. H. FULTON, d/b/a R. H. FULTON, CONTRACTOR, *Respondent*.

No. 73-577

R. H. FULTON, d/b/a R. H. FULTON, CONTRACTOR, *Petitioner*,

vs.

SOO LINE RAILROAD COMPANY and CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Respondents*.

BRIEF IN OPPOSITION FOR RESPONDENT, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD TO R. H. FULTON'S "CONDITIONAL" CROSS-PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported in 481 F. 2d 326.

JURISDICTION

Judgment of the Court of Appeals was entered on April 27, 1973. Fulton's petition for a rehearing was denied on June 4, 1973. Soo Line mailed its petition for a writ of certiorari to the clerk of this court on September 1, 1973. Fulton's "Conditional Cross-Petition for a Writ of Certiorari" was served on respondent Rock Island on September 28, 1973. Petitioner Fulton invokes jurisdiction under 28 U.S.C. Sec. 1254(1). This court does not have jurisdiction to entertain the "Conditional Cross-Petition" under U.S. Supreme Court Rule 22(3) and 28 U.S.C. Sec. 2101(c).

ARGUMENT

The time limitations set forth in Supreme Court Rule 22(3) and 28 U.S.C. Sec. 2101(c) must be complied with before this court has jurisdiction to review this case on certiorari. Fulton's "Conditional Cross-Petition" was filed more than 90 days after the judgment it seeks review upon and under the aforesaid rule and statute was therefore not timely.

Unlike the situation involving criminal cases, where this court has held that timeliness for the Petition for Writ of Certiorari is not jurisdictional, see, for example, *Durham* v. *U. S.*, 401 U.S. 481 [1969], with respect to civil cases, jurisdiction will not lie if the petition is untimely. *Toledo Scale Company* v. *Computing Scale Company*, 261 U.S. 399; *Scofield* v. *National Labor Relations Board, et al.*, 394 U.S. 423, 427; *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, 344 U.S. 206. See also, *Bradford Electric Company* v. *Clapper*, 284 U.S. 221.

The time for filing the Petition for Writ of Certiorari begins to run when the lower court's decision is final. *Federal Trade Commission* v. *Minneapolis-Honeywell Company*, *supra*. In the case at bar the time began to run on June 4, 1973, when Fulton's petition for rehearing was denied. *Citizens Bank of Michigan City, Indiana* v. *Opperman*, 249 U.S. 448 (1919). Rock Island's counsel received Fulton's brief in opposition to Soo Line's Petition for Certiorari and "Conditional Cross-Petition" for Writ of Certiorari on September 28, 1973. Under Title 28 U.S.C. Sec. 2101(c) one seeking a writ of certiorari before the Supreme Court shall apply for the writ within 90 days after the entry of judgment or decree by the lower

court. Ninety days from June 4, 1973, was Sunday, September 2, 1973. Monday, September 3 was Labor Day and the first business day after the Labor Day weekend was September 4. This was the last day for filing a Petition for Writ of Certiorari.

The Eighth Circuit's "Conclusion", entered on April 27, 1973, was as follows:

> "The judgment for Rock Island on Fulton's claim against the Rock Island and for Fulton on Rock Island's counterclaim is affirmed. The judgment in favor of Soo Line is vacated and the cause is remanded for another trial on Fulton's claim against Soo in accordance with the views expressed in this opinion." 481 F. 2d at 339.

The record in the trial court shows that separate judgments were entered as to Soo Lines and the Rock Island (327, 328). Obviously, what Fulton has filed is a separate Petition for a Writ of Certiorari asking this court to review a separate judgment.

Fulton may not use Soo Line's petition for review of the judgment pertaining to Soo Line as a vehicle for launching his own attack on the judgment rendered in favor of the Rock Island. 7 Moore *Federal Practice* (2d Ed.) Sec. 72.05(3). If, in fact, Fulton was dissatisfied with the portion of the decision affirming the trial court's decision with respect to the Rock Island, his recourse was to petition for a writ of certiorari from that judgment.

Although the Supreme Court Rules no longer refer to cross-petitions for certiorari or cross-appeals (let alone "Conditional" Cross-Petitions), it has long been recognized that the term "cross-appeal" or "cross-petition" is used to refer to an appeal by an appellee against the first

appellant, while the term "separate appeal" is used to refer to an appeal which is neither the first appeal nor a cross-appeal. 7 Moore *Federal Practice* (2d Ed.) Sec. 72.05 [2]. In the present case in the trial court there were separate judgments entered on separate jury verdicts (327, 328). In the Eighth Circuit, the judgment in favor of Soo Line was reversed and remanded, while the judgment involving the Rock Island was affirmed. 481 F. 2d 326, 339. Fulton has 90 days from June 4, 1973, to seek a review of the Rock Island judgment. He failed to do so. Even if there were not separate judgments, Fulton would still be out of time. As pointed out in the concurring opinion in *Tallman* v. *Udall*, 324 F. 2d 411 (D.C. App., 1963):

> "It may seem anomalous at first blush that a successful litigant in a lower court should be under any necessity whatsoever of appealing from the decree which brought him victory. But the judgment may, as here, be comprised of several elements, adverse as well as favorable. If the prevailing party wishes to rely on appeal on a contention decided against him he must preserve his rights by appeal. This can be by a cross-appeal if time permits after his opponent has appealed, or it may be by a timely notice of appeal which can be dismissed if the other party elects not to pursue the litigation further. In the absence of such preservation of the point, the successful litigant must be taken to have regarded the grounds upon which he won as so strong that he is content to rely upon them alone in the appellate proceedings."

The general principles to be stated as to the necessity for either cross or separate appeals are equally applicable where review by the Supreme Court is by certiorari.

Marley Company v. *Maryland Casualty Co.*, 300 U.S. 185; *Ryerson* v. *U. S.*, 312 U.S. 405; 7 Moore *Federal Practice* (2d Ed.) Sec. 72.05(1). The consequences of a failure to file a separate appeal, or as here, a separate petition for a writ of certiorari, are well illustrated by the case of *United States* v. *Bertman*, 377 U.S. 995, the facts of which are set forth in the dissenting opinion on the denial of the writ of certiorari.

A review on a writ of certiorari is not a matter of right, but of sound legal discretion, and will be granted only where there are special and important reasons therefor. U.S. Sup. Ct. Rule 19. The "Conditional Cross-Petition" of Fulton presents nothing worthy of review by this court. Fulton's claim in his Statement of the Case that the Court of Appeals did not give consideration to a number of points of error urged below, and refused to pass on Fulton's third point of error in his motion for a rehearing is inaccurate. The Appellate Court held that the trial court's charge to the jury viewed as a whole, accurately stated the law and was a substantially correct statement of the applicable law. 481 F. 2d 336, 339. If the Court of Appeals was in error in holding that the Carmack Amendment pre-empted common law liability, Fulton was not prejudiced thereby. He was allowed to put into evidence and to argue all of his common law negligence claims against the Rock Island. 481 F. 2d 336-337. There was no question as to the trial court's jurisdiction over the Rock Island such as was raised by the Soo Line. The question of conflict among the circuits can be settled by granting the Soo Line's Petition for a Writ of Certiorari. But Fulton should not be allowed to enlarge his own rights as to rehash arguments already passed on by clinging to the Soo Line's coattails.

CONCLUSION

For the above-stated reasons, as well as those detailed in the opinion below, Fulton's "Conditional Cross-Petition" for a Writ of Certiorari should be denied.

Respectfully submitted,

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